Supreme Court, U.S.
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Case No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

G.I. TRUCKING COMPANY,
Appellant/Petitioner,
VS.
INSURANCE COMPANY OF NORTH AMERICA,
Appellee/Respondent.

U.S. Court of Appeal/
9th Circuit No. 92-15234
U.S.D.C. No. CV-91-02631-TEH

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION FOR REVIEW:

Does a letter from a shipper's subrogated insurer which reads:

> "... This letter is our preliminary notice of loss/damage to the shipment of lenses in the amount of $100,000 (estimate). Please note that we have not yet paid this claim to our insured; as soon as we will make payment to them we will send the final claim bill to you ..."

satisfy the presuit claims filing regulation promulgated by the Interstate Commerce Commission at 49 C.F.R. 1005.2(b)(3), that such claim be made for payment of a specified or determinable amount?

Parties

Plaintiff/Appellant before the Ninth Circuit Court of Appeals and Respondent herein: Insurance Company of North America.

Defendant/Respondent before the Ninth Circuit Court of Appeals and Appellant herein: G.I. Trucking Company. G.I. Trucking Company is a wholly owned subsidiary of Carolina Freight Corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, G.I. Trucking Company ("G.I. Trucking") respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on August 2, 1993.

Opinions Delivered In The Case

Petitioner G.I. Trucking seeks review of the opinion of the United States Court of Appeals for the Ninth Circuit in Opinion No. 91-15234 which was filed and judgment entered in on August 2, 1993. The opinion is contained in this Petition as Appendix A. Though designated for publication, as of the date of this Petition, the opinion has not yet been published in the official reporter. That opinion reversed the decision of the United States District

Court, Northern District of California, which appears at 783 F.Supp. 1251 (N.D. Cal. 1991), and which is contained in this Petition as Appendix Exhibit B.

Jurisdiction

The judgment of the Ninth Circuit Court of Appeals was entered on August 2, 1993. G.I. Trucking petitioned that Court for rehearing and suggested the appropriateness of Rehearing En Banc on August 16, 1993. By Order dated October 29, 1993, the Ninth Circuit denied the petition for rehearing and suggestion for rehearing en banc. Jurisdiction to review the judgment in question by writ of certiorari is conferred upon this Court by 28 U.S.C. 1254(1).

Statement of the Case

This case involves interpretation of two federal regulations, specifically, 49 C.F.R. Section 1005.2 and 49 C.F.R. Section 1035.1, as follows:

> Section 1005.2 Filing of Claims
>
> (a) *Compliance with regulations.* A claim for loss or damage to baggage or for loss, damage, injury or delay to cargo, shall not be voluntarily paid by a carrier unless filed, as provided in paragraph (b) of this section, with the receiving or delivering carrier, or carrier issuing the bill of lading, receipt, ticket, or baggage check, or carrier on whose line the alleged loss, damage, injury, or delay occurred, within the specified time limits applicable thereto and as otherwise may be required by law, the terms of the bill of lading or other contract of carriage, and all tariff provisions applicable thereto.
>
> (b) *Minimum filing requirements.* A written or electronic communication (when agreed to by the carrier and shipper or receiver involved) from a claimant, filed with a proper carrier within the time limits specified in the bill of lading or contract of carriage or transportation and: (1) Containing facts sufficient to identify the baggage or shipment (or shipments) of property, (2) asserting liability for alleged

loss, damage, injury, or delay, and (3) making claim for the payment of a specified or determinable amount of money, shall be considered as sufficient compliance with the provisions for filing claims embraced in the bill of lading or other contract of carriage; *Provided, however,* That where claims are electronically handled, procedures established to ensure reasonable carrier access to supporting documents.

(c) *Documents not constituting claims.* Bad order reports, appraisal reports of damage, notations of shortage or damage, or both, on freight bills, delivery receipts, or other documents, or inspection reports issued by carriers or their inspection agencies, whether the extent of loss or damage is indicated in dollars and cents or otherwise, shall, standing alone, not be considered by carriers as sufficient to comply with the minimum claim filing requirements specified in paragraph (b) of this section.

(d) *Claims filed for uncertain amounts.* Whenever a claim is presented against a proper carrier for an uncertain amount, such as "$100 more or less," the carrier against whom such claim is filed shall determine the condition of the baggage or shipment involved at the time of delivery by it, if it was delivered and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It shall not, however, voluntarily pay a claim under such circumstances unless and until a formal claim in writing for a specified or determinable amount of money shall have been filed in accordance with the provisions of paragraph (b) of this section.

49 C.F.R. 1005.2; and

Section 1035.1 Requirement for certain forms of bills of lading

(a) All bills of lading referred to in this Part may be either paper documents or electronically generated and/or transmitted bills of lading.

(b) All common carriers, except express companies, engaged in the transportation of property by rail or by water

subject to the Interstate Commerce Act served with notice of this proceeding and parties thereto, are hereby notified and required to cease and desist on or before August 8, 1919 from using their present bills of lading to the extent that the provisions and regulations contained therein are inconsistent with or different from the provisions and regulations contained in the forms of bills of lading designated as appendixes B and D.

(c) All common carriers subject to the act heretofore served with notice of this proceeding are hereby notified and required to adopt and put in use on or before August 8, 1919, upon notice to the Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act (49 U.S.C. 6), and thereafter to use and employ, uniformly when they issue bills of lading covering shipments, other than livestock, moving in interstate commerce, as required by and defined in section 20 of the act (49 U.S.C. 20), and such forms of bills of lading referred to as appendixes B and D.

§ 1035.2 Appendix D; form of domestic (straight) bill of lading prescribed

(See 49 C.F.R., 1938 ed., 31.2)

Note: Section 2(b) of the bill-of-lading contract terms and conditions is corrected to indicate a nine-month period within which to file claims with carriers on domestic as well as export traffic as a condition precedent to the recovery for loss, damage, injury, or delay to property while in the possession of carriers in accordance with the Act of April 23, 1930, 46 Stat. 251.

49 C.F.R. 1035.1

The plaintiff in this action alleged that defendant damaged a shipment of intraocular lenses while in transit from the United States to Mexico. Jurisdiction in the first instance was predicated upon 28 U.S.C. 1337 in that the action is governed by 49 U.S.C. 11707, an act of Congress regulating commerce.

The shipment moved pursuant to the terms and conditions of the Uniform Domestic Straight Bill of Lading which in conformity with the prescriptions of 49 C.F.R. 1035.2, Appendix D, which provides:

> "As a condition precedent to recovery, claims must be filed with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury, or delay occurred, or carrier in possession when the loss, damage, injury, or delay occurred, within nine months after the delivery of the property (or, in the case of export traffic, within nine months of delivery at port of export) . . . where claims are not filed . . . thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

Respondent, Insurance Company of North America ("INA"), plaintiff in the district court proceeding below, was the property loss insurer for the owner of the cargo. The policy limit was $100,000 with a $2,500 deductible. INA's maximum exposure to its insured was $97,500. The insured's loss occurred on or about April 18, 1988. INA took eleven months to adjust the claim and paid its insured $97,500 in March 1989. On March 28, 1989, INA, through its agents, Cigna Property and Casualty Companies and Recovery Services International, filed a Standard Form For Presentation of Loss with G.I. Trucking. When informed that it had sacrificed its subrogation rights by failing to file its claim with defendant G.I. Trucking within nine months, INA contended that it had preserved its rights by sending this letter during the nine month claim period:

> ". . . This letter is our preliminary notice of loss/damage to the shipment of lenses in the amount of $100,000.00 (estimate). Please note that we have not yet paid this claim to our insured; as soon as we will make payment to them we will send the final claim bill to you . . ."

G.I. Trucking sought summary judgment before the district court contending that this letter did not constitute a cognizable claim under 49 C.F.R. 1005.2(b)(3) because it provided only an estimate and was not a claim for a specific amount. G.I. Trucking

contended that the purposes of the regulation, as well as those of the Interstate Commerce Act, would be subverted if insurers could avoid the spirit of the rule by sending an inchoate claim featuring an "estimate" in the same amount as its policy limit. The district court agreed. The Circuit Court did not.

Argument Amplifying Reasons For Allowance of the Writ

A writ should issue because the Ninth Circuit Court of Appeals has rendered a decision squarely in conflict with the decisions of three other United States Courts of Appeal on the same matter. At pages 8187 and 8188, the Ninth Circuit's opinion states:

> Other circuits, however, have held that a claim must specify an amount of damages to be considered legally sufficient under the regulations. See *Nedlloyd*, 922 F.2d 905, 908-909 (1st Cir. 1991); *Pathway Bellows v. Blanchette*, 630 F.2d 900, 903 (2nd Cir. 1980). (Court ruled that a letter was not sufficient notice because it did not affirmatively assert liability against the carrier and failed to claim a specified or ascertainable amount of damages.) We expressly reject this conclusion.

Subsequently, the United States Court of Appeals, Fifth Circuit, adopted the contrary view in *Salzstein v. Bekins Van Lines*, 993 F.2d 1187 (5th Cir. 1993), and relied in part on the decision of the district court *sub judice*.

In *Adams Express Co. v. Croninger*, 226 U.S. 491, 505-506 (1913), this court held that the imposition of uniform rules upon shippers and carriers engaged in interstate commerce was necessary to facilitate the orderly and efficient conduct of interstate commerce. The conflict between the Circuits regarding this rule of national application which is pertinent to the everyday workings of the national economy is destructive of that uniformity. Accordingly, this Court should act to resolve the conflict, giving direction to future litigants as to the correct interpretation and application of the subject regulations.

Conclusion

For the reasons stated, this Petition for Writ of Certiorari should be granted by the Court.

Respectfully submitted,

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APPENDIX

A. *Insurance Company of North America v. GI Trucking*, No. 92-15-234, August 2, 1993 ..... A-1

B. *Insurance Company of North America v. GI Trucking*, 783 F.Supp. 1251 (N.D. Cal. 1991) B-1

APPENDIX, EXH. 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff-Appellant,

v.

G.I. TRUCKING COMPANY, et al.,
Defendant-Appellee.

No. 92-15234
D.C. No. CV-91-02631-TEH
OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted
June 18, 1993 — San Francisco, California

Filed August 2, 1993
Before: Thomas E. Fairchild*, Robert R. Beezer,
Charles Wiggins, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

The court of appeals reversed a judgment of the district court. The court held that a writing communicating the fact of damage and an intent to hold the carrier liable was sufficient notice of claim under regulations of the Interstate Commerce Commission.

Appellant Insurance Company of North America was subrogee of the rights of its insured against appellee G.I. Trucking Company for damage to goods transported by G.I. in April 1988. In December 1988, INA sent a letter to G.I. that identified INA and its relationship to the shipper, the shipment in question, and an

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*Hon. Thomas E. Fairchild, Senior United States Circuit Judge for the 7th Circuit Court of Appeals, sitting by designation.

estimate of a $100,000 loss. INA eventually paid its insured $97,500. G.I. denied liability. In 1991, INA sued G.I. in state court, alleging carrier liability and negligence. G.I. removed the case and moved for summary judgment in district court, contending that INA and its insured had failed to give written notice of the claim within nine months as required by the contract, which incorporated by reference the Uniform Bill of Lading. The court granted the motion. INA appealed.

[1] The ICC regulations concerning the UBL require that a written notice of claim identify the shipment, assert a liability claim, and claim payment of a specified or determinable amount, **[2]** and, in the case of uncertain amounts, that the carrier receiving the notice investigate to determine the condition of the shipment at the time of delivery and the extent of the loss for which it might be responsible.

[3] Although no Ninth Circuit case had directly addressed whether those regulations applied to contested cases, one case implied that they did, and if they were held not to so apply, a carrier would be able to control its own obligations under the regulations by deciding whether to contest a claim or not, which would permit precisely the type of discrimination among claimants that the regulations were intended to address. Therefore, the regulations applied to INA's case.

[4] INA's written communication of damage and of its intent to hold G.I. liable was sufficient notice under the regulations because it enabled G.I. to make a prompt investigation, which was the purpose of the written claim requirement, not to permit the carrier to escape liability.

COUNSEL

Glen R. Olson, Long & Levit, San Francisco, California, for the plaintiff-appellant.

James Attridge, Hanson, Bridgett, Marcus, Vlahos & Rudy, San Francisco, California, for the defendant-appellee.

Kenneth E. Siegel and Patricia J. McCabe, Alexandria, Virginia, and William D. Bierman, Westwood, New Jersey, for the amicus.

OPINION

WIGGINS, Circuit Judge:

FACTS

On April 19, 1988, G.I. Trucking Company ("G.I.") transported a shipment of intraocular lenses from Los Angeles to Calexico, California, for Eye Technology, Inc. ("Eye Tech"). The shipment was damaged, and Eye Tech sought and received compensation for its damages from its insurer, Insurance Company of North America ("INA"). Having paid Eye Tech's claim, INA became the subrogee of Eye Tech's rights against G.I.

On December 2, 1988, Recovery Services, International ("RSI"), INA's subrogation unit, sent a letter to G.I. stating:

> We are the Subrogation Dept. for the Insurance Co. of North America: The Insurer of Eye Technology Inc. This letter is our preliminary notice of loss/damage to the shipment of lenses in the amount of $100,000 (Estimate). Please note that we have not yet paid this claim to our insured; as soon as we will make payment to them we will send the final claim bill to you. We are enclosing herewith supporting documents pertaining to above file for your record.

On March 3, 1989, INA paid Eye Tech $97,500, and on March 27, 1989, RSI forwarded a "Standard Form for Presentation of Loss" to G.I. Trucking, claiming entitlement to $100,000.00. On April 4, 1989, G.I. denied responsibility and refused to pay the claim. The parties corresponded over the course of several months, but G.I. continued to deny any liability on INA's claim.

On April 4, 1991, INA filed suit against G.I. in California State court. INA asserted two causes of action, one for carrier liability and one for negligence. G.I. denied the allegations and removed the action to federal district court. G.I. then filed a motion for summary judgment, alleging that INA and Eye Tech had failed to file a claim for losses within the nine month period as per the bill of lading, the Carmack amendment, and regulations promulgated thereunder.

The district court granted G.I.'s motion for summary judgment stating that "[clearly] . . . the plaintiff's December 2nd claim was for an 'uncertain amount' and did not constitute a legally sufficient claim within the requirements of the ICC regulations." INA appeals.

STANDARD OF REVIEW

We review a grant of summary judgment de novo. *F.D.I.C. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992); *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir. 1992). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there is a genuine issue of material fact and whether the district court applied the relevant substantive law correctly. *F.D.I.C.*, 969 F.2d at 747, *Jones*, 968 F.2d at 940.

DISCUSSION

G.I. Trucking and Eye Tech entered into a carrier contract that incorporated by reference the Uniform Bill of Lading ("UBL") as part of the contract. Section 2.(b) of the UBL indicates that a written claim must be filed within nine months for a party to recover from a carrier for damage, loss, or delay. Courts have long recognized the reasonableness and validity of such provisions in bills of lading and have routinely enforced them. *See e.g., Northern Pac. Ry. v. Mackie*, 195 F.2d 641, 642 (9th Cir. 1952). Parties, however, are forever litigating whether a particular communications constitutes a sufficient written notice of claim. Indeed, that is the issue before us.

G.I. contends that INA cannot recover for its losses because of its failure timely to file a written notice of claim. INA, on the other hand, maintains that its December 2nd letter satisfies the claim requirement. We agree with INA.

[1] The Interstate Commerce Commission ("ICC") has promulgated regulations that outline the minimum requirements of a written notice of claim under the UBL. The regulations provide that a notice must be in writing and contain (1) "facts sufficient to identify the baggage or shipment . . . of property,

(2) [an assertion] of liability for alleged loss, damage, injury, or delay, and (3) a claim for the payment of a specified or determinable amount of money[.]" 49 C.F.R. § 1005.2(b) (1992).

[2] Paragraph (d) of § 1005.2 deals specifically with claims for uncertain amounts. 49 C.F.R. § 1005.2(d) (1992). It states that when such a claim is filed, the carrier against whom it is filed shall determine the condition of the baggage or shipment involved at the time of delivery and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which the carrier may be responsible. *Id.* Paragraph (d) proscribes voluntary payment of the claim until a formal claim in writing is filed in accordance with the provisions of the paragraph (b). *Id.*

Initially, it appears that these regulations govern resolution of this case. However, the circuits are split on the issue of whether the regulations apply to contested claims. Thus, the first issue we must resolve is whether the ICC regulations outlined above apply here.

Section 1005.1 of the ICC regulations, entitled "Applicability of regulations," provides that the regulations "shall govern the processing of claims for loss, damage, injury, or delay to property transported . . . in interstate or foreign commerce . . ." *Id.* § 1005.1. The First and Second Circuits have concluded that this language indicates that the regulations are meant to apply to all claims against carriers, contested or uncontested. *See Nedlloyd Lines v. Harris Transport*, 922 F.2d 905, 907 (1st Cir. 1991); *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900, 904 (2nd Cir. 1980) (stating that "the regulations provide the appropriate standard for assessing the sufficiency of all claims irrespective of the way they may subsequently be resolved or adjudicated"), *cert. denied*, 450 U.S. 915 (1981). The Seventh Circuit, however, has ruled that the regulations apply only to uncontested claims. *See Wisconsin Packaging Co. v. Indiana Refrigerator Lines, Inc.*, 618 F.2d 441, 445 (7th Cir.) (en banc), *cert. denied*, 449 U.S. 837 (1980).

[3] While this court has decided two "written claims" cases since promulgation of the regulations, neither of the decisions directly address whether the regulations apply to contested

claims. *See Culver v. Boat Transit, Inc.*, 782 F.2d 1467 (9th Cir. 1986); *Taisho Marine & Fire Ins. Co. v. Vessel Gladiolus*, 762 F.2d 1364 (9th Cir. 1985). However, the *Culver* court implies that the regulations apply to contested claims. *See Culver*, 782 F.2d at 1468-69 & n.1 (addressing certain provisions of 49 C.F.R. § 1005 and indicating that they are consistent with the court's decision). Moreover, we find the rationale of *Nedlloyd* persuasive on this issue. In holding that the regulations applied to contested as well as uncontested claims, the *Nedlloyd* court stated:

> If the ICC regulations were held to apply only to uncontested claims, a carrier could control its own obligations under the regulations by deciding whether or not to contest a claim. In other words, once it received an adequate notice of claim, a carrier could choose to settle the claim voluntarily, in which case it would be required to follow the ICC regulations concerning processing and payment. Alternatively, by denying liability, the shipper could avoid the ICC procedure for responding to an adequate claim and force the shipper to file suit. Thus, limiting the applicability of the regulations to voluntarily-settled claims would permit precisely the type of discrimination among claimants that the regulations were intended to address.

Nedlloyd, 922 F.2d at 908 (citation omitted). Based on the implied application of the regulations to a contested claim in *Culver* and the rationale of *Nedlloyd*, we hold that the ICC regulations apply to contested claims.

However, our determination that the regulations apply to contested claims does not completely resolve this case. We must also determine whether a written claim must specify a dollar amount to be legally sufficient under the regulations. While this court has never addressed this question directly, we have held that a claim, which did not specify an amount, was legally sufficient following promulgation of the regulations. *Culver*, 782 F.2d at 1467-69. Other circuits, however, have held that a claim must specify an amount of damages to be considered legally sufficient under the regulations. *See Nedlloyd*, 922 F.2d at 908-09; *Pathway Bellows*, 630 F.2d at 900-03 (court ruled that a letter was not sufficient notice because it did not affirmatively assert liability against the

carrier and failed to claim a specified or ascertainable amount of damages). We expressly reject this conclusion.

Cases decided by this court after promulgation of the ICC regulations have held that written claims are to be liberally construed and that the standard for determining sufficiency is one of substantial performance. *Taisho*, 762 F.2d at 1368; *see also Culver*, 782 F.2d at 1469. Citing *Wisconsin Packing*, the *Taisho* court stated that "[t]he form of the written notice is less important than its adequacy in apprising the carrier of the basis for the claim and of the fact that reimbursement will be sought." *Taisho*, 762 F.2d at 1368. The *Culver* court limited *Taisho*, noting that "*Taisho* simply relaxed the need for a formal claim in limited situations." *Culver*, 782 F.2d at 1469. The *Culver* court also indicated that after *Taisho* a shipper cannot recover damages if a written claim is required under the bill of lading, and one is not filed within the period provided by the bill. *Id.* Moreover, the *Culver* court concluded that "[1] a written notice of damage, coupled with [2] a clearly communicated intent to hold the carrier liable, plus [3] the carrier's investigation, sufficies as a written claim." *Id.* Notably, the court did not indicate that an amount had to be specified in order to satisfy the written claim requirement.[1]

[4] Here, there was a written notice of damage and a clearly communicated intent to hold G.I. liable. Moreover, the record indicates that G.I. performed some investigation of the

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[1]The district court indicated that the plaintiff in *Culver* had noted the amount of damage on the bill of lading. Thus, the district court concluded that *Culver* supported G.I.'s position because the notation on the bill of lading provided the parties in that case with the exact information that the parties here lacked, i.e., the amount of damages. However, the district court misapprehended the character of the notation on the bill of lading in *Culver*. The notation on the bill of lading stated: "Damage to boat due to accident 1/18/82. Damage and repair pending." *Culver*, 782 F.2d at 1468. No dollar amount was attached to the damages until later.

claim.[2]Under *Taisho* and *Culver*, nothing more is required to satisfy the written claim requirement. Indeed, the purpose of the written claim requirement is not to permit the carrier to escape liability, but to insure that the carrier may make a prompt and thorough investigation of the claim. *See Culver*, 782 F.2d at 1469; *Pathway Bellows*, 630 F.2d at 903 n.5. The December 2nd letter accomplished this purpose.

In addition, we are not convinced that the December 2nd letter does not satisfy the regulations even if strictly applied.[3] INA sent a written communication that clearly identified the shipment and asserted liability. Moreover, while the letter did not specify an amount of damages, that amount was arguably determinable from the other information given in the letter or already available to the carrier. While some would debate whether the claim complied with the regulations in every respect, a liberal construction of the

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[2]It is unclear from the record to what extent G.I. investigated this claim. At the hearing on the motion for summary judgment, the parties appeared to agree that the reason an amount had not been specified by INA within the nine month period was because INA was looking into the possibility of salvaging the lenses. Both parties apparently thought that the lenses could be resterilized and sold on the market. G.I. maintains that it did not perform the kind of investigation it normally would have in the case of a $100,000 claim because it believed that the goods would be salvaged. G.I. contends that this belief was based on representations made by Eye Tech and INA.

Were we to rule in G.I.'s favor on the basis that a full investigation was not undertaken, we would create a rule that would permit a carrier to avoid liability by failing to investigate a claim even when provided with the information necessary to undertake the investigation. Thus, we conclude that a shipper's failure to investigate a claim or failure thoroughly to investigate a claim when provided with the necessary information, including facts necessary to identify the goods and put the shipper on notice as to the potential liability, will not prevent recovery for the damaged goods.

[3]As indicated previously, we must construe a written claim liberally under a standard of substantial performance. *See Taisho*, 762 F.2d at 1368.

letter leads to the conclusion that the letter substantially complied with the regulations.[4]

Finally, it seems that the notice in this case served its purpose. It identified the shipment, contained a clear intention to hold the carrier liable, and gave what proved to be an accurate estimate of the claim amount. No more is needed to permit the shipper to make a prompt and thorough investigation, which is the purpose of the notice requirement. *See Culver,* 782 F.2d at 1469. Accordingly, we conclude that the Dec. 2nd letter was a legally sufficient written notice of claim, and we REVERSE the district court's grant of summary judgment in favor of G.I.

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[4]G.I. also argues that paragraph (d) of 49 C.F.R. § 1005.2, entitled "Claims for uncertain amounts," precludes INA's action for damages. However, we read the paragraph differently. Paragraph (d) proscribes voluntary payment of a claim that does not meet the requirements of paragraph (b), but it does not necessarily preclude the presentation of such a claim in a court of law. The First Circuit has indicated that the regulations must be read to bar a subsequent suit if a sum certain of damages is not claimed within the nine month period. *Nedlloyd*, 922 F.2d at 908. Otherwise, the court contends the regulatory purpose of encouraging voluntary settlement would be frustrated because a shipper could bring an action against a carrier without first providing the carrier the opportunity voluntarily to pay a properly notified claim. *Id.* We find this argument unpersuasive. We fail to see why shippers will be eager to circumvent the notice requirements, avoid voluntary settlement, and embark upon expensive, time-consuming litigation to recover their damages. Moreover, we believe that there are circumstances, such as those presented by the facts of this case, in which a claim should be considered sufficient even though it does not specify the amount of damages. *See also Nedlloyd,* 922 F.2d at 909 (excusing the failure to specify an amount of damages in certain situations).

APPENDIX, EXH. 2

INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff,

v.

G.I. TRUCKING CO., et al.,
Defendants.

No. C91-2631 TEH.

United States District Court,
N.D. California.

Dec. 31, 1991.

Shipper's insurer sued carrier to recover payment made to insured for loss resulting from damage to shipment of intraocular lenses. Carrier moved for summary judgment on ground that claim was not made within nine-month period established under uniform straight bill of lading, Carmac Amendment to Interstate Commerce Act, and ICC regulations. The District Court, Thelton E. Henderson, Chief Judge, held that: (1) insurer's letter giving preliminary notice of claim which contained estimate of shipper's loss did not constitute claim within meaning of governing ICC regulations, and (2) ICC regulations setting forth minimum filing requirements for filing of cognizable claim applied to contested as well as voluntarily paid claims.

Motion granted.

1. Commerce § 85.31

The letter of a shipper's insurer conveying preliminary notice of estimate of shipper's loss to carrier which contained estimate of claimed loss did not constitute "claim" within meaning of governing Interstate Commerce Commission regulations; estimate of damages of $100,000 was not sufficient to inform carrier of specific amount of claim as required by regulations. 49 U.S.C.A. § 11707(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Commerce — 85.1

Interstate Commerce Commission regulations setting out minimum filing requirements for filing of cognizable claim applied to contested as well as voluntarily paid claims. 49 U.S.C.A. § 11707(a).

Kenneth F. Lovett, San Francisco, Cal., for plaintiff.

William D. Taylor, James Attridge, Hanson Bridgett Marcus Vlahos & Rudy, San Francisco, Cal., for defendants.

ORDER

THELTON E. HENDERSON, Chief Judge.

This matter comes before the court on the defendant's motion for summary judgment, filed with the court on October 15, 1991. The motion came on for oral argument on Monday, December 16, 1991 at 10:00 a.m. After careful consideration of the moving papers, declarations, and oral arguments, the court is satisfied that summary judgment should be GRANTED in favor of the defendants.

FACTUAL BACKGROUND

Eye Technology contracted with G.I. Trucking to carry a shipment of intraocular lenses from Los Angeles to Calexico, California en route to Mexico. The lenses were insured by INA. On or about April 18, 1988, the lenses were damaged.

On December 2, 1988, approximately eight months after receipt of the damaged lenses, INA sent the following communication to G.I. Trucking:

> . . . This letter is our preliminary notice of loss/damage to the shipment of lenses in the amount of $100,000 (estimate). Please note that we have not yet paid this claim to our insured; as soon as we will make payment to them we will send the final claim to you . . .

Declaration of James Attridge, ¶ 5, Exh. D-2. However, no further notice firmly establishing the specific amount of the claim was sent to G.I. Trucking until March 28, 1989, over eleven months after the damaged cargo was delivered.

The plaintiff and defendants represented at oral argument that a reason for the delay in identifying the exact amount of the damage was that after the damage occurred the plaintiff believed that it might be possible to salvage the shipment, at least in part. The parties agreed that the plaintiff made the defendant aware of the intent to attempt to salvage the shipment. In addition, G.I. Trucking had no knowledge of the actual value of the shipment. G.I. Trucking's tariff required that the value of items of extraordinary worth be stated on the bill of lading. Here, the shipper did not do so.

NATURE OF THE MOTION

The defendants (G.I. Trucking) move for summary judgment, claiming that INA failed to make a legally sufficient claim within the nine month period established under the uniform straight bill of lading, the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11707(a), and the regulations promulgated thereunder, 49 C.F.R. § 1035.2, (ICC regulations), and is therefore barred from bringing this action. G.I. Trucking contends that under the terms of the bill of lading at issue and the ICC's regulations, INA was required to make a legally sufficient claim within nine months of receipt of the damaged goods. G.I. Trucking contends that no claim meeting the specificity requirements of the Carmack Amendment, the bill of lading, and the ICC regulations was made until over eleven months after receipt of the damaged goods.

INA contends that its letter of December 2, 1988, received approximately eight months after the April 18, 1988 receipt of the damaged goods, constituted a legally sufficient notice of claim. G.I. Trucking contends that the December 2, 1988 letter did not meet the relevent legal requirements under the ICC regulations, the bill of lading, and the Carmack Amendment because it did not state the specific amount of the claim, but gave only an estimate.

The sole issue is whether the December 2, 1988 letter constituted a claim within the meaning of the bill of lading, the ICC regulations and the Carmack Amendment.

LEGAL STANDARD

Summary judgement is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgement as a matter of law. *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir.1985); Fed.R.Civ.P. 56(c). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "If the evidence is merely colorable or is not significantly probative, summary judgement may be granted." *Id.* 477 U.S. at 251, 106 S.Ct. at 2511 (citations omitted). In ruling on a summary judgement motion, a court must view all facts and draw all inferences in the light most favorable to the nonmoving party. *Poller v. CBS, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962).

A party seeking summary judgement bears the initial burden of informing the court of the basis for its motion, and identifying those portions of the pleadings and discovery responses which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Where the moving party will have the burden of proof on an issue at trial, she must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. Whereas, the moving party can prevail on a motion for summary judgement on an issue for which her opponent will have the burden of proof at trial by merely "pointing out to the District Court — that there is an absence of evidence to support the nonmoving paty's case." *Id.*

If the moving party meets its initial burden, the opposing party must then "set forth specific facts showing that there is a genuine issue for trial" to defeat the motion. *Anderson, supra,* 477 U.S. at 250, 106 S.Ct. at 2511; Fed.R.Civ.P. 56(e).

In this case there is no dispute over the material facts. Therefore, the sole question is whether the moving party is entitled to judgement as a matter of law.

DISCUSSION

The parties do not dispute that the Carmack Amendment governs this action. Under the Interstate Commerce Commission's regulations, bills of lading must incorporate a "nine-month period within which to file claims with carriers of domestic as well as export traffic as a condition precedent to the recovery for loss, damage, injury or delay to property while in the possession of carriers." 49 C.F.R. § 1035.2. The bill of lading at issue in this action was in compliance with this provision and therefore incorporated the nine-month claims limitations period. The nine month rule is anticipated and sanctioned by the Carmack Amendment. 49 U.S.C. § 11707(e).

There is no question that a failure to file a claim within the nine month period is absolutely fatal to the claim. *Taisho Marine & Fire Ins. Co. v. Vessel Gladiolus*, 762 F.2d 1364, 1369 (9th Cir.1985); *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900 (2d Cir.1980), *cert. den.* 450 U.S. 915, 101 S.Ct. 1357, 67 L.Ed.2d 340 (1981). Therefore the March 28, 1989 claim, filed over 11 months after receipt of the damaged cargo, cannot be deemed to have been sufficient notice within the terms of the bill of lading. Thus, the sole question is whether the December 2, 1988 correspondence constituted sufficient notice.

[1] The central point of contention is whether it is necessary for the claimant to specify in its notice of claim the specific sum claimed. The December 2, 1988 correspondence contained only an estimate of damages rather than a specific amount.

At page 3 of its opposition, the plaintiff concedes that 49 CFR § 1005.2 sets out the minimum filing requirements for the filing of a cognizable claim, and that subsection (b) of that regulation establishes as a "minimum filing requirement" that the communication from the claimant: "(1) Contain[ ] facts sufficient to identify the baggage or shipment . . .; (2) Assert[ ] liability for the loss, damage, injury or delay, and; (3) Mak[e] a claim for the

payment of a specified or determinable amount." The defendant points to subsection (d) of the same regulation, which reads:

> (d) Claims filed for uncertain amounts. Whenever a claim is presented against a proper carrier for an uncertain amount, such as "$100 more or less," the carrier against whom such claim is filed shall determine the condition of the baggage or shipment involved at the time of delivery by it . . . and shall ascertain as nearly as possible the extent, if any, of the loss or damage for which it may be responsible. It shall not, however, voluntarily pay a claim under such circumstances unless and until a formal claim in writing for a specified or determinable amount of money shall have been filed in accordance with the provisions of paragraph (b) of this section. 49 CFR § 1005.2(d).

Given that the plaintiff concedes the applicability of subsection (b) of the above regulation, subsection (d) must also be applicable.

It is clear that the December 2, 1988 communication contained facts sufficient to identify the baggage or shipment and asserted liability for the loss, damage, injury or delay. The sole question is whether the estimate of damage was sufficiently specific within the terms of subsections (b) and (d). The plaintiff contends that the estimate of damages of $100,000 was sufficient to satisfy the third requirement. The defendant contends that this estimate was not sufficiently specific under the terms of the regulation.

The overriding purpose of the ICC regulations was "to discourage discrimination on the part of carriers by facilitating the voluntary settlement of claims." *Nedlloyd Lines v. Harris Transport*, 922 F.2d 905, 908 (1st Cir. 1991). Prior to the enactment of the regulations, carriers often forced even legitimate claims into lengthy litigation. The situation resulted in carriers engaging in discrimination between favored and disfavored shippers. "Carriers could admit liability and quickly pay the claims of favored shippers while dragging other shippers, with similar claims, through the long, inconsistent and expensive litigation process. (citation). This form of discrimination was one of the evils the Carmack Amendment sought to eliminate." *General Elec. Co. v.*

Brown Transport Corp., 597 F.Supp. 1258 (E.D.Va.1984). The ICC regulations required that a carrier would be precluded from collection unless it made an early and specific claim, thereby allowing *any* shipper, large or small, to voluntarily settle a claim without litigation.

Unfortunately, the circuits are divided as to the application of the ICC regulations, with the First and Second Circuits, and several lower courts holding that the ICC's regulations require the claimant to specify a specific dollar sum within the nine month period, while the Seventh Circuit has held that no such specific designation is required. However, the rule of the First and Second Circuits is clearly the majority rule, and it is much more reasonable.

The reasoning adopted by the Second Circuit is discussed clearly by the Southern District Court of New York in a case remarkably similar to the one at bar. In *Bobst Division v. IML Freight, Inc.*, 566 F.Supp. 665 (S.D.N.Y.1983), the court passed upon the sufficiency of a letter which read as follows:

> Please be advised that the above referenced machine which arrived in Port Newark on or about December 26, 1977, was found to be damaged. The estimated amount of damage is approximately $100,000.00.
>
> By notice of this letter, we hold your company liable for said damages. A claim will be filed on our behalf by our insurance company, who will contact you regarding this shipment.

The *Bobst* court held that the statement, "The estimated amount of damage is approximately $100,000.00," did not constitute a claim for a "specified amount," or a "determinable" amount. *Id.* at 669. The *Bobst* court noted the similarity of such a claim to the example of an insufficient claim given in the ICC regulations, which refer to a claim "for an uncertain amount such as $100 more or less . . ." Id., citing 49 CFR § 1005.2(d). As such, the *Bobst* court held that the claim at issue was for an "uncertain amount," and could not "be regarded as constituting compliance with the minimum filing requirements contained in subsection (b) [of 49 CFR 1005.2]." Id.

The claim at issue in the case at bar is virtually indistinguishable from the claim in *Bobst*. In the December 2, 1988 letter, INA informed G.I. Trucking of a claim for an "amount of $100,000 (estimate)." As if to emphasize the uncertainty of this estimate, the same paragraph in the December 2 letter continued, "Please note that we have not yet paid this claim to our insured; as soon as we will make payment to them we will send the final claim to you." Furthermore, after the damage the plaintiff had informed G.I. Trucking that it was examining the possibility of salvaging the damaged lenses, which might have substantially mitigated the damages. Clearly, under the rationale of the *Bobst* court, the plaintiff's December 2nd claim was for an "uncertain amount," and did not constitute a legally sufficient claim within the requirements of the ICC regulations. The letter was not sufficient to inform the defendants of the specific amount of the claim.

The *Bobst* decision flowed directly from the Second Circuit's conclusion in *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900, 904 (2d Cir.1980), that the ICC regulations "provide the appropriate standard for assessing the sufficiency of all claims . . ." The *Pathway Bellows* court held that a claim letter that "failed to claim a specified or ascertainable amount of money as damages" was insufficient under the ICC regulations, and therefore precluded recovery of damages. *Id.* at 908.

The First Circuit has applied the same rule. In *Nedlloyd Lines v. Harris Transport*, 922 F.2d 905 (1st Cir.1991), the court held that the plaintiff was barred from recovering damages because although it filed two claims within the nine month period, neither specified the amount of money claimed. *Id.* at 908. The First Circuit explained that the purpose of the ICC regulations was to encourage voluntary resolution of shipping damage disputes "by ensuring that both shipper and carrier have adequate information to evaluate liability and the extent of damages." The court found that the plaintiff's failure to specify an amount claimed undermined this purpose: "Nedlloyd's notice of claim failed to specify an amount, Harris could not have voluntarily paid the claim, even if it had been inclined to do so." The court found the plaintiff's claim therefore to be barred, and held that to allow the action to

proceed would "frustrate the regulatory purpose of encouraging voluntary settlement . . ." *Id.* at 908.

The Eastern District Court of Virginia, after engaging in a detailed discussion of legislative history, also concluded that the ICC regulations apply to disputed as well as voluntarily settled claims and require the plaintiff to submit a claim for a specific dollar amount within the nine month period. *General Elec. Co. v. Brown Transport Corp.*, 597 F.Supp. 1258 (E.D.Va.1984); *see also, Calpro Co. v. Consolidated Engineering Co.*, 502 F.supp. 707, 713-14 (N.D.Ga.1980); *R.T.A. Corp. v. Consolidated Rail Corp.*, 594 F.Supp. 205, 209-10 (S.D.N.Y.1984).

[2] The plaintiff, however, points to the *en banc* decision of the Seventh Circuit in *Wisconsin Packing Co. v. Indiana Refrigerator Lines*, 618 F.2d 441 (7th Cir.1980) (en banc). In that case the Seventh Circuit acknowledged that a purpose of the ICC regulations was to facilitate settlement. However, the *Wisconsin Packing* court reasoned that this purpose was only relevant for claims which were voluntarily settled, and was irrelevant for litigated claims. *Id.* at 445. Where the claim is litigated, the Seventh Circuit held that the sufficiency of the claim was to be assessed under the case law developed prior to the issuance of the ICC regulations. These cases would allow recovery without the amount of the claim having been specified. *Id.* The Seventh Circuit reasoned that a primary purpose of the notice requirement was to expeditiously inform the shipper of any claims so that the claims could be researched while recollections were fresh. Notice of the precise amount of the claim was not necessary to serve this purpose, but only notice sufficient to allow the shipper to investigate the claim. Therefore, the Seventh Circuit held that the ICC regulations did not govern the sufficiency of claim notices in litigated claims.

The Seventh Circuit's reasoning is clearly the minority rule. The *Wisconsin Packing* decision has been widely criticized on the ground that the purpose of the ICC regulation is to encourage settlement of all claims, not just some, and claims are much more likely to settle if a precise dollar sum of the claim has been established. Under the Seventh Circuit's reasoning, a shipper could simply refuse to claim a precise dollar sum, thereby forcing

litigation and avoiding the requirements of the ICC regulations altogether. There is no apparent rationale in either the language or purpose of either the ICC regulations or the Carmack Amendment to suggest that the regulations are to apply only to voluntarily settled claims and not to litigated claims. As the First Circuit noted in *Nedlloyd*:

> Uniform application of the regulations to all claims protects shippers as well as carriers. If the ICC regulations were held to apply only to uncontested claims, a carrier could control its own obligations under the regulations by deciding whether or not to contest a claim. In other words, once it received an adequate notice of claim, a carrier could choose to settle the claim voluntarily, in which case it would be required to follow the ICC regulations concerning processing and payment . . . Alternatively, by denying liability, the shipper could avoid the ICC procedure for responding to an adequate claim and force the shipper to file suit. Thus, limiting the applicability of the regulations to voluntarily-settled claims would permit precisely the type of discrimination among claimants that the regulations were intended to address."

In addition to the First Circuit, *Wisconsin Packing* has been expressly rejected for similar reasons by the Second Circuit, *Pathway Bellows, Inc. v. Blanchette*, 630 F.2d 900, 903-04 (2d Cir.1980) ("we do not believe that the dual standards for assessing the sufficiency of claims, depending upon whether the carrier voluntarily decides to settle a claim or to contest its liability, were either intended or mandated."); the Southern District of New York, *Bobst Division v. IML Freight, Inc.*, 566 F.Supp. 665 (S.D.N.Y.1983) and *R.T.A. Corp. v. Consolidated Rail Corp.*, 594 F.Supp. 205, 209 n. 7 (S.D.N.Y.1984) (rejecting Seventh Circuit rule and citing numerous courts which have followed the Second Circuit); the Northern District of Georgia, *Calpro Co. v. Consol. Engineering Co.*, 502 F.Supp. 707, 712 (N.D.Ga.1980) (rejecting the Seventh Circuit rule and noting the "every other federal district or appellate court to consider the question of the I.C.C. regulations' scope has reached the opposite conclusion"); and the Eastern District of Virginia, *General Elec. Co. v. Brown Trans. Corp.*, 597 F.Supp. 1258 (E.D.Va.1984) ("the Court is of

the opinion that the Seventh Circuit's voluntary/involuntary distinction was neither intended nor mandated by the ICC regulations.")

Moreover, as noted by the Second Circuit, the plain language of the ICC regulations state their application to "the full range of matters relating to the filing of claims . . ." *Pathway Bellows*, 630 F.2d at 904 n. 7, quoting 40 CFR § 1005.1.[1] This court is in agreement with the First Circuit and Second Circuits that "the ICC regulations apply to contested as well as voluntarily paid claims." 922 F.2d at 908.

The plaintiff points out that the Ninth Circuit in *Taisho Marine & Fire Ins. Co. v. Vessel Gladiolus*, 762 F.2d 1364, 1368 (9th Cir.1985) relied upon *Wisconsin Packing*, in holding that "The form of the written notice is less important than its adequacy in apprising the carrier of the basis for the claim and of the fact that reimbursement will be sought." This court notes that the Ninth Circuit's citation to *Wisconsin Packing* was mere *dicta*, and as such is not binding upon the court. The plaintiff ignores the outcome of *Taisho*, in which the court held that the plaintiff could *not* maintain its claim because of late filing. The *Taisho* decision turned on the fact that the notice in that case was insufficient because it was not timely, a matter about which there is no division among the circuits. The *Taisho* court did not specifically address the question now before this court, that is,

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[1]The ICC regulations at issue state:

We are persuaded by the record in this proceeding that our regulations should embrace the full range of matters relating to the filing of claims, including a prescription of minimum filing requirements and a consideration of documents that do not constitute claims, and claims for uncertain amounts . . .

Thus, the rules set forth in sections 1005.1 and 1005.2 . . . first establish their overall applicability and then set out the manner and form in which loss and damage claims must be filed by claimants in order to accomplish the improvements shown to be required in the public interests in this area.

Ex Parte No. 263; Rule, Regulations, and Practices of Regulated Carriers with Respect to the Processing of Loss and Damage Claims, 340 I.C.C. 515 (1972).

whether the notice of claim must state a specific dollar sum. In addition, the Ninth circuit in *Taisho* did not even address the Second Circuit's, or any other court's criticism of the Seventh Circuit's *Wisconsin Packing* decision. Under the circumstances, it is clear to this court that the Ninth Circuit, in the cited dicta from *Taisho*, did not directly address the question now before the court, and did not intend to direct the lower courts to follow the Seventh Circuit's *Wisconsin Packing* rule. This case clearly illustrates the problem of dicta and the reasons that it does not create binding precedent.

The plaintiff also cites *Culver v. Boat Transit, Inc.*, 782 F.2d 1467 (9th Cir.1986). However, *Culver* actually weighs in favor of the defendant. The *Culver* court cited the Ninth Circuit's decision in *Northern Pac. Ry. v. Mackie*, 195 F.2d 641 (9th Cir. 1952), which required strict compliance with the written claim notice requirements, and noted the apparent conflict between *Taisho* and *Mackie*. However, *Culver* resolved the conflict by substantially limiting *Taisho's* application. ("*Taisho* simply relaxed the need for a formal claim in limited situations.") *Culver*, 782 F.2d at 1469. In remanding the case and reversing the trial court's grant of summary judgment against the plaintiff, the *Culver* court expressly noted that "there was notation on the bill of lading noting the damage caused by the accident." 782 F.2d at 1469 n. 2. Therefore, the parties in *Culver* had exactly the information concerning the amount of damages which the parties in the instant action lacked. The *Culver* court reaffirmed the strict notice requirements of *Mackie*, even in the face of *Taisho*, thereby undermining the plaintiff's case.

The court finds the reasoning of the First and Second Circuits to properly state the law. We therefore find that the ICC regulations establish the proper standards for evaluating the sufficiency of all claims. In this case, it is clear in light of *Bobst, Pathway Bellows, Nedlloyd,* and *Brown Transport* that the December 2, 1988 claim letter was not sufficiently specific within the terms of the ICC regulations. Therefore, it is clear that the plaintiffs are barred from proceeding with this action. *Pathway Bellows, supra; Nedlloyd Lines, supra.*

The parties do not dispute the facts which are material to this motion for summary judgment. Plaintiff's opposition to defendants motion to dismiss at 2. Summary judgment is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgement as a matter of law. *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir.1985); Fed.R.Civ.P. 56(c). Since it is clear that on the undisputed facts the defendant is entitled to judgment as a matter of law, summary judgment should be GRANTED.

For the foregoing reasons and in accordance with the above, after careful consideration of the submissions and written and oral arguments of the parties, and good cause appearing therefor, IT IS HEREBY ORDERED that:

1. Summary judgment is GRANTED in favor of the defendants.

IT IS SO ORDERED.

B-14

Deepak KUMAR and Lakhibir Singh,
Petitioners,

v.

David N. ILCHERT, District Director,
Immigration and Naturalization Service,
Respondent.

No. C-91-4032-DLJ.

United States District Court,
N.D. California.

Jan. 2, 1992.

Alien applicant for admission applied for parole. District Director of Immigration and Naturalization Service denied parole. Alien petitioned for writ of habeas corpus. The District Court, Jensen J., held that delay, attributable in part to alien's motion for change of venue, was not emergent cause or circumstance qualifying alien for parole.

Petition denied.

1. Aliens § 53.9

Arriving alien who does not appear to be clearly and beyond doubt entitled to land may be detained for further inquiry; likewise, alien who arrives without documents may also be detained. Immigration and Nationality Act, § 235(b), as amended, 8 U.S.C.A. § 1225(b).

2. Aliens § 53.9

Alien detained for failing to appear to be entitled to land or who arrives without documents may request parole. Immigration and Nationality Act, § 212(d)(5)(A), as amended, 8 U.S.C.A. § 1182(d)(5)(A).

3. Aliens § 53.9

Delay in bringing arriving alien before Immigration Court for determination of exclusion status did not justify paroling alien for emergent or humanitarian reasons strictly in public interest; exclusion proceedings had been commenced, alien appeared before Immigration Court within two months of arrival in United States, and alien requested change of venue which contributed to delay in scheduling hearing. Immigration and National Act, § 235(b), as amended, 8 U.S.C.A. 1225(b).

Jonathan M. Kaufman of Alan Kaufman, San Francisco, Cal., for petitioners.

Alberto E. Gonzalez, Sp. Asst. U.S. Atty., San Francisco, Cal., for respondent.

ORDER

JENSEN, District Judge.

On December 11, 1991, this Court heard petitioner Deepak Kumar's petition for a writ of habeas corpus.[1] Jonathan M. Kaufman appeared for petitioner. Assistant United States Attorney Alberto E. Gonzalez appeared for respondent. Having considered the papers submitted, the arguments of counsel, the applicable law, and the entire record herein, the Court DENIES the petition.

I. BACKGROUND

Petitioner Kumar is an alien applicant for admission to the United States who is presently in the custody of the United States Immigration and Naturalization Service ("INS"). Respondent is the District Director of the INS. Petitioner seeks review of

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[1]At the hearing, both parties represented to the Court that petitioner Lakhbir Singh has been paroled from INS custody. Petitioner Singh's petition will be dismissed as moot.

respondent's denial of parole to petitioner, pursuant to an application for a writ of habeas corpus (28 U.S.C. § 2241).

Petitioner arrived in the United States at Los Angeles airport on September 24, 1991. Petitioner arrived without travel documents and was detained by the INS per-